

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2012 MSPB 113

Docket Nos. SF-0752-10-0714-I-2
SF-0752-11-0203-I-1

**Norma J. Wingate,
Appellant,**

v.

**United States Postal Service,
Agency.**

September 27, 2012

Norma J. Wingate, San Francisco, California, pro se.

Joshua T. Klipp, Esquire, San Francisco, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the August 8, 2011 initial decision in which the administrative judge found that the agency had constructively suspended the appellant and reversed both that action and the appellant's subsequent removal. The appellant argues on review that the administrative judge erred in finding that she failed to establish her affirmative defenses. For the following reasons, we AFFIRM the initial decision AS

MODIFIED by this Opinion and Order, still finding that the appellant failed to establish her affirmative defenses.

BACKGROUND

¶2 In these consolidated appeals, the administrative judge found that the agency subjected the appellant to a constructive suspension from September 16, 2009 to November 3, 2010, and that the agency failed to prove its charge in the removal action that the appellant was absent without leave (AWOL) from January 4 through September 2, 2010. *Wingate v. U.S. Postal Service*, MSPB Docket No. SF-0752-10-0714-I-2, Initial Appeal File (IAF), Tab 39, Initial Decision (ID) at 12-15, 18-19. The administrative judge issued a single initial decision in which she reversed both the constructive suspension and the removal, and ordered the agency to retroactively restore the appellant. *Id.* at 16-17, 19. The administrative judge also found that the appellant failed to prove her affirmative defenses of race, color, sex, age, and disability discrimination, and failed to establish that the agency retaliated against her based on her prior equal employment opportunity (EEO) activity. *Id.* at 24-32.

¶3 In her timely petition for review, the appellant expresses her disagreement with the administrative judge's conclusion that the agency's actions were not motivated by discrimination and reargues her affirmative defenses, citing five examples that she claims illustrate "how I see" the evidence discussed in the initial decision. Petition for Review File (PFR File), Tab 1 at 4-8. Among other things, she also challenges the agency's compliance with the initial decision,¹

¹ The agency asserts in its response to the appellant's petition for review that the appellant's evidence shows that it has complied with the administrative judge's interim relief order by instructing the appellant to return to work and requesting her cooperation in processing her back pay claim. PFR File, Tab 3 at 2. After the close of record on review, the appellant filed a petition for enforcement of the initial decision, which the regional office returned to the appellant as premature because the initial decision was not yet final. PFR File, Tabs 5-6. Moreover, the issue of the agency's compliance with the interim relief order is now moot because the appellant has received a final Board

claims that the agency continues to harass her and to retaliate against her, and asserts her entitlement to compensatory and punitive damages.² *Id.* at 9-70.

ANALYSIS

¶4 To establish a claim of prohibited employment discrimination, the employee first must establish a prima facie case; the burden of going forward then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its action; and, finally, the employee must show that the agency's stated reason is merely a pretext for prohibited discrimination. *McDonnell Douglas Corp. v. Green*, [411 U.S. 792](#), 802-04 (1973). However, like here, where the record is complete and a hearing has been held, it is unnecessary to follow that traditional burden-shifting order of analysis; rather, the inquiry shifts from whether the appellant has established a prima facie case to whether she has demonstrated by a preponderance of the evidence that the agency's reason for its actions was a pretext for discrimination. *Jackson v. U.S. Postal Service*, [79 M.S.P.R. 46](#), 52-53 (1998).

¶5 Regarding the appellant's affirmative defenses of race, color, and sex discrimination, the administrative judge found that other than identifying herself as an African-American female, the appellant offered no evidence that her emergency placement in off-duty status or her removal for AWOL were based on

order on the merits in her favor. *See Gannon v. U.S. Postal Service*, [61 M.S.P.R. 41](#), 48 (1994). Subsequent issues concerning compliance with the Board's final order may be raised with the regional office in accordance with [5 C.F.R. § 1201.181](#). *Id.*

² The Back Pay Act does not authorize the Board to award compensatory damages to a prevailing appellant. *E.g.*, *Cunningham v. Department of Veterans Affairs*, [91 M.S.P.R. 523](#), ¶ 3 (2002). Further, because the appellant did not prevail based on a finding of discrimination, she is not entitled to compensatory damages on that basis. *Cf. Melendez v. Department of Veterans Affairs*, [106 M.S.P.R. 128](#), ¶ 6 (2007) (compensatory damages are recoverable pursuant to the Civil Rights Act of 1991 by employees who prevail in a Board appeal based on a finding of intentional employment discrimination under Title VII of the Civil Rights Act of 1964). Also, the Board is without authority to order punitive damages. *Cunningham*, [91 M.S.P.R. 523](#), ¶ 3.

her race, color, or sex, and that the appellant had instead argued that, in the absence of any other explanation, the agency's actions were based on prohibited discrimination. ID at 24-25. Nevertheless, based on her careful evaluation of each witness's demeanor, the administrative judge found that the agency's witnesses credibly testified that their actions were not motivated by prohibited discrimination. *Id.* at 24-26. Moreover, in considering the appellant's demeanor, the administrative judge found "that the appellant was intransigent, emotional, and at times volatile" in dealing with Sharon Gray, the manager who, among other things, initiated the appellant's emergency placement into off-duty status. *Id.* at 26. Thus, the administrative judge found little factual support in the record for the appellant's bare allegations of discriminatory animus based on race, color, or sex. *Id.* Without such supporting evidence, the administrative judge found the appellant's allegations insufficient to prove her claim by preponderant evidence. *Id.* The administrative judge similarly found that the appellant failed to make more than a bare allegation that the agency discriminated against her on the basis of any of her allegedly disabling conditions, i.e., eczema, stress disorder, and depression. *Id.* at 32. We agree with the administrative judge's analysis.

¶6 The inquiry is much the same for the appellant's retaliation claim; where a hearing was held and the record is complete, the inquiry proceeds to the ultimate question of whether, upon weighing the evidence presented by both parties, the appellant has met her overall burden of proving retaliation. *Anderson v. Department of Veterans Affairs*, [113 M.S.P.R. 522](#), ¶ 9 (2010). Again, the administrative judge found no evidence that the agency official responsible for the appellant's emergency placement into off-duty status, or any other agency officials that had knowledge of the appellant's prior EEO activity, were motivated by retaliatory animus. ID at 28. The administrative judge also found no basis to conclude that the agency officials who lacked knowledge of the appellant's prior EEO activity were influenced to retaliate against the appellant by those who

possessed such knowledge. *Id.* We agree with the administrative judge’s analysis.

¶7 In adjudicating the appellant’s claim under the Age Discrimination in Employment Act of 1967 (ADEA), the administrative judge applied *Bowman v. Department of Agriculture*, [113 M.S.P.R. 214](#), ¶ 8 (2010), which in turn relied on *Gross v. FBL Financial Services, Inc.*, [557 U.S. 167](#), 180 (2010), a decision in which the Supreme Court found that “a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the ‘but-for’ cause of the challenged adverse employment action.” However, as the Equal Employment Opportunity Commission (EEOC) recently noted, the Supreme Court in *Gross* applied [29 U.S.C. § 623](#)(a)(1), the ADEA provision applicable to private sector employees. *Alotta v. Department of Transportation*, EEOC Appeal No. 0120093865, 2011 WL 2515244, at *2 (June 17, 2011). Whereas [29 U.S.C. § 623](#)(a)(1) prohibits discrimination “because of” age, [29 U.S.C. § 633a](#)(a), the ADEA provision applicable to employees in the federal sector, requires that personnel actions in federal employment “shall be made free from any discrimination based on age.” [29 U.S.C. §§ 623](#)(a)(1), 633a(a). Based on the differing statutory language, the EEOC found that Congress intended for different standards to apply to private sector employees and employees of the federal government under the ADEA. *Alotta*, 2011 WL 2515244, at *3 (citing *Fuller v. Gates*, 2010 WL 774965 (E.D. Tex. March 1, 2010)). The EEOC further found that, based on plain meaning, the “free from any” language in [29 U.S.C. § 633a](#)(a) must be construed as being broader than the “because of” language in [29 U.S.C. § 623](#)(a)(1), and that the “mixed motive analysis” that is not available to private sector employees under *Gross* continues to apply in age discrimination claims against the federal government. *Alotta*, 2011 WL 2515244, at *3. Applying the broader language of [29 U.S.C. § 633a](#)(a), the EEOC found that the appellant could not prevail on his age discrimination claim “[i]n the absence of any clear evidence that age was a factor” in the

challenged agency decision. *Alotta*, 2011 WL 2515244, at *3. The Board must defer to the EEOC concerning issues of substantive discrimination law. *E.g.*, *Spahn v. Department of Justice*, [93 M.S.P.R. 195](#), ¶ 16 (2003). Accordingly, we overrule *Bowman* and hold that a federal employee may prove age discrimination by establishing that age was a factor in the challenged personnel action, even if it was not the “but-for” cause of that action.³

¶8 In the initial decision, the administrative judge accurately summarized the appellant’s evidence in support of her age discrimination claim. ID at 30-31. First, she noted testimony that Gray, the appellant’s manager, referred to the appellant as “old” during a conversation with one of the appellant’s subordinate employees after the appellant placed the subordinate employee on leave without pay. *Id.* at 30. The administrative judge also noted the appellant’s testimony that her union representative twice told her “he was not trying to force [the appellant] to retire.” *Id.* In addition, the administrative judge considered the fact that the appellant’s acting manager was less than half the appellant’s age, as well as the appellant’s claim that the agency’s actions were an attempt to force her to retire. *Id.* at 30.

¶9 Although the administrative judge applied the “but-for” standard in her adjudication of the appellant’s age discrimination claim, we find that the evidence considered by the administrative judge does not establish that the appellant’s age was a factor in the challenged personnel actions. Neither the appellant’s speculation about the agency’s motives, nor the fact that the appellant’s acting manager was significantly younger than she, is probative of the agency’s motive. Similarly, the comments by the appellant’s union representative are not relevant

³ We note that the U.S. Court of Appeals for the District of Columbia Circuit reached the same result regarding the proper inquiry in age discrimination claims against the federal government. In *Ford v. Mabus*, [629 F.3d 198](#) (D.C. Cir. 2010), the court held that the different statutory language in [29 U.S.C. § 623\(a\)\(1\)](#) and [29 U.S.C. § 633a\(a\)](#) means that a federal employee may prevail “by proving that age was *a* factor in the employer’s decision.” *Ford*, 629 F.3d at 206 (emphasis in original).

to whether the agency was motivated by age discrimination. Additionally, the comment made by the appellant's manager that merely acknowledged the appellant's age, but did not relate to the challenged personnel actions, is simply insufficient to establish that the appellant's age was a factor in those actions. We have considered the appellant's assertions on review, but we find no stronger evidence that age was a factor in the agency's actions. *See* PFR File, Tab 1. Because the appellant's evidence does not establish that age was a factor in the agency's actions, we find that the appellant failed to prove her claim of age discrimination.

ORDER

¶10 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113](#)(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) ([5 U.S.C. § 7702](#)(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, D.C. 20507

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. See [5 U.S.C. § 7703](#)(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See [42 U.S.C. § 2000e-5](#)(f) and [29 U.S.C. § 794a](#).

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final

decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's [Rules of Practice](#), and [Forms](#) 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.